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16 *[See Additional Counsel on Signature Page]*

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA**

CHERYL A. TINDER-HOWELL, on  
behalf of herself and all others similarly  
situated,

Plaintiff,

v.

UNION PACIFIC RAILROAD  
COMPANY, successor to SOUTHERN  
PACIFIC TRANSPORTATION  
COMPANY, SFPP, L.P. (formerly known  
as SANTA FE PACIFIC PIPELINES,  
INC., formerly known as SOUTHERN  
PACIFIC PIPELINES, INC.), KINDER  
MORGAN OPERATING L.P. "D", and  
KINDER MORGAN G.P., INC.,

Defendants.

CLASS ACTION

CASE NO. 3:15-cv-00317-LRH-(VPC)  
(consolidated with 3:15-cv-00478)

JOINT CASE MANAGEMENT  
REPORT

**SPECIAL SCHEDULING REVIEW  
REQUESTED**

FILED	RECEIVED
ENTERED	SEARCHED ON
COUNSEL/PARTIES OF RECORD	
APR 20 2016	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPT. _____

JOINT CASE MANAGEMENT REPORT

1 Plaintiff Cheryl A. Tinder-Howell ("Plaintiff"), Defendant Union Pacific Railroad  
2 Company ("Union Pacific"), and Defendants SFPP, L.P., Kinder Morgan Operating L.P.  
3 "D", and Kinder Morgan G.P., Inc.'s (collectively, "Kinder Morgan"), jointly submit this  
4 Joint Case Management Report.<sup>1</sup>

5 **1. Statement of the Nature of the Case:**

6 Kinder Morgan operates a subterranean petroleum pipeline that runs beneath the  
7 rights-of-way of Union Pacific through six Western States, including within Nevada.

8 Plaintiff's Claims:

9 Plaintiff filed this case on behalf of a putative class of persons who contend they  
10 own real property adjoining and underlying the railroad right-of-way underneath which  
11 the pipeline is located. Plaintiff alleges that Union Pacific has purported to lease an  
12 easement in the subsurface to Kinder Morgan and collected and attempted to collect rents  
13 for Kinder Morgan's use of the subsurface of the right-of-way for a petroleum pipeline.  
14 Plaintiff alleges that she and the Class are the true owners of the subsurface through  
15 which that pipeline runs.

16 The First Cause of Action is for declaratory judgment, and seeks a declaration that  
17 Defendants have no legal right to use or to occupy land owned by Plaintiff and the Class  
18 and no legal right to collect rent or profit from the use of Plaintiff's and the Class's land.  
19 The Second Cause of Action for trespass seeks to recover damages to Plaintiff and the  
20 Class from Defendants on the basis that they had and have no legal right to grant  
21 "easements" in, to occupy, or to operate a pipeline within property owned by Plaintiff and  
22 the Class. The Third Cause of Action is for quiet title, and seeks the Court's judgment

23 <sup>1</sup> Because the parties are in agreement regarding this Joint Case Management Report, per  
24 the Court's Order of March 21, 2016 that "[o]ut-of-town and out-of-state counsel" may  
25 appear by telephone, the parties agree that their out-of-town and out-of-state counsel will  
26 only participate by telephone. See Doc. No. 120.

1 quieting title in the aforementioned subsurface real property solely in the respective  
2 names of Plaintiff and the Class, free and clear of any claimed interest by Defendants.  
3 The Fourth Cause of Action is for ejectment, and seeks to recover from Defendants  
4 possession of the real property owned by Plaintiff and the Class, and for rents, profits,  
5 and the reasonable cost of repair or restoration of the property to its original condition.  
6 The Fifth Cause of Action is for inverse condemnation, and seeks to recover  
7 compensation for the Plaintiff's and Class's subsurface rights that have already been  
8 taken and sold. The Sixth Cause of Action is for unjust enrichment, and seeks to recover  
9 the benefits that have been unjustly obtained and retained by Defendants as a result of  
10 their use and occupation of property owned by Plaintiff and the Class. The Seventh Cause  
11 of Action is for an accounting of the benefits that the Defendants have obtained by virtue  
12 of their use and occupation of property owned by Plaintiff and the Class.

13 Defendants' Defenses:

14 Plaintiff cannot meet her burden to establish the class certification requirements  
15 under Rule 23 of the Federal Rules of Civil Procedure. Plaintiff has not established her  
16 own standing, and she will not be able to establish standing for absent putative class  
17 members on a representative basis. Plaintiff does not state valid claims for relief, and in  
18 particular, each of Plaintiff's causes of action is subject to dispositive motions.

19 Plaintiff's claims are barred by, among other factual and legal reasons relating to  
20 title, legal defenses including waiver, consent, laches, the applicable statutes of  
21 limitations, superior rights, condemnation, adverse possession, prescriptive easement,  
22 and/or operation of law. Plaintiff and the alleged Class have not sustained any damage  
23 and they are not entitled to any amount of recovery, attorney's fees, interest, or other  
24 costs. Defendants' investigation is ongoing and Defendants reserve the right to assert  
25 additional defenses.  
26

**2. A Description of the Principal Factual and Legal Disputes in the Case:**

The nature of the parties' property interests in the right-of-way;

Whether Plaintiff can establish the certification requirements of Rule 23 of the Federal Rules of Civil Procedure;

Whether Union Pacific had sufficient property interests in the subsurface of its right-of-way to convey property rights in the subsurface beneath its right-of-way to Kinder Morgan;

Whether Defendants sought and/or obtained the consent of Plaintiff and the Class to install, maintain, lease, and operate a pipeline underneath Union Pacific's right-of-way;

What Defendants knew or had reason to know regarding Union Pacific's ownership interest in the subsurface underneath its right-of-way;

Whether Union Pacific's activities were outside the scope of its easement;

Whether the building, operation, and maintenance of a subterranean pipeline beneath the railway right-of-way may be severed from the railroad use and terminated;

Whether Union Pacific's easement was terminated;

Whether Plaintiff's and the Class's claims are barred by waiver, consent, laches, the applicable statutes of limitations, superior rights, condemnation, adverse possession, prescriptive easement, and/or operation of law;

Whether Defendants acted with malice or reckless indifference;

Whether Defendants have profited or been unjustly enriched by use of the property allegedly owned by Plaintiff and the Class;

Whether Plaintiff and the Class sustained any damages and, if so, the nature and extent of any such damages;

Whether Plaintiff and the Class may seek or recover attorneys' fees, pre-judgment

1 and post-judgment interest, costs, actual damages, exemplary and/or punitive damages,  
2 restitution, and declaratory, injunctive, or equitable relief.

3 The parties' investigation is ongoing and the parties reserve the right to assert  
4 additional legal and factual issues.

5 **3. Jurisdictional Bases for the Case:** Subject matter jurisdiction exists  
6 pursuant to the minimal diversity and amount in controversy provisions of the Class  
7 Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d). Under CAFA, "district courts  
8 shall have original jurisdiction of any civil action in which the matter in controversy  
9 exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class  
10 action" in which "any member of a class of plaintiffs is a citizen of a State different from  
11 any defendant." 28 U.S.C. § 1332(d)(2)(A). This case is a class action, as defined by 28  
12 U.S.C. § 1332(d)(1)(B), and the amount in controversy exceeds \$5,000,000, exclusive of  
13 interest and costs. Plaintiff is a citizen of Nevada. Defendant Union Pacific is a citizen of  
14 Nebraska and/or Delaware. Therefore, "any member of a class of plaintiffs is a citizen of  
15 a State different from any defendant," and federal jurisdiction exists under 28 U.S.C. §  
16 1332(d)(2)(A). Additionally, the real property which forms the subject matter of this  
17 action is located within the State of Nevada.

18 **4. Parties Who have Not been Served:** None.

19 **5. Additional Parties and Amendment of Pleadings:** It is presently  
20 unknown whether additional parties will be added. Defendants are evaluating whether  
21 there are any absent, necessary parties. Defendants are also evaluating whether to file  
22 cross (counter)-complaints and/or complaints against third parties. Additionally, Plaintiff  
23 does anticipate amending her complaint as needed based on discovery and other initial  
24 case developments. The parties request the deadline to add other parties or claims be set  
25 for **August 1, 2016**. The parties request the deadline to file amended pleadings be set for  
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1 August 1, 2016.

2 **6. List of Motions and Statement of Issues to be Decided by Motions:**

3 Defendants anticipate filing motions for summary judgment, motions to strike,  
4 Daubert motions, and motions in limine. Defendants' investigation is ongoing and  
5 Defendants reserve the right to bring additional motions in the future.

6 Plaintiffs anticipate filing a motion for class certification pursuant to Fed. R. Civ.  
7 P. 23 and pretrial evidentiary motions.

8 **7. Pending Motions that May Affect the Parties' Abilities to Comply with**  
9 **a Case Management Order:** There are no pending motions that will affect the parties'  
10 ability to comply with a case management order.

11 **8. Status of Related Cases Pending Before Other Courts or Other Judges**  
12 **of This Court:** Due to the Court's consolidation order (Doc. No. 92), there are no  
13 related cases pending before this Court.

14 This case is related to three cases pending in other United States District Courts:  
15 *Mooney, et al. v. Union Pac. R.R. Co., et al.*, District of Arizona, Case No. 2:15-cv-01092  
16 (the "Arizona Related Case"); *In re SFPP Right-of-Way Claims*, Central District of  
17 California, Case No. SACV 15-00718 (the "California Related Case"); and *Meerscheidt,*  
18 *et al. v. Union Pac. R.R. Co., et al.*, District of New Mexico, Case No. 2:15-cv-00514  
19 (the "New Mexico Related Case"), (collectively with this action, the "Related Cases").

20 **(a) The Arizona Related Case:** Plaintiffs' Consolidated Class Action Complaint  
21 ("Complaint") was filed on January 15, 2016. Defendants each answered the Complaint  
22 and filed counterclaims on February 23, 2016. On March 18, 2016, Defendant Union  
23 Pacific filed amended counterclaims. On April 1, 2016, Plaintiffs answered Kinder  
24 Morgan's counterclaims, and moved to partially dismiss Union Pacific's counterclaims.  
25 Union Pacific's deadline to respond to Plaintiff's motion to dismiss is April 18, 2016. A  
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1 case management conference is scheduled for May 6, 2016.

2       **(b) The California Related Case:** Plaintiffs' Complaint was filed on November  
3 30, 2015. After motion practice, Defendants each answered the Complaint and filed  
4 counterclaims on March 4, 2016. On April 8, 2016, Plaintiffs answered Kinder Morgan's  
5 counterclaims, and moved to partially dismiss Union Pacific's counterclaims. Union  
6 Pacific's deadline to respond to Plaintiffs' motion to dismiss is April 18, 2016. Plaintiffs'  
7 motion to dismiss is set for hearing on May 9, 2016. A status conference is scheduled for  
8 June 2, 2016.

9       **(c) The New Mexico Related Case:** Plaintiffs' Complaint was filed on February  
10 26, 2016. Defendants each answered the Complaint and filed counterclaims on March 28,  
11 2016. Also on March 28, 2016, Kinder Morgan filed a motion to compel arbitration as to  
12 one of the named plaintiffs. The deadline to respond to Kinder Morgan's motion to  
13 compel arbitration is April 15, 2016; however, the deadline will likely be extended to  
14 April 21, 2016. Plaintiffs' deadline to respond to Defendants' counterclaims is April 21,  
15 2016.

16       **9. Supplemental Discussion of Necessary Discovery:**

17       **(a) The extent, nature, and location of discovery anticipated by the parties:**

18       The parties anticipate that discovery will relate to the claims and defenses  
19 identified above. The parties anticipate discovery encompassing records dating from the  
20 mid-19th century to the present. The parties request that discovery proceed in accordance  
21 with the Federal Rules of Civil Procedure, however, the parties anticipate prioritizing  
22 discovery needed to create an evidentiary record upon which Plaintiff's class certification  
23 motion(s) can be briefed and decided consistent with the briefing schedule set forth  
24 below. Additionally, the parties propose that the discovery will be shared by all parties in  
25 the Related Cases. In that regard:

1 • Documents produced in any of the Related Cases should be treated as  
2 having been produced in all of the Related Cases;

3 • Written discovery produced in any of the Related Cases should be treated  
4 as having been produced in all of the Related Cases;

5 • Fact depositions taken in any of the Related Cases should be deemed to  
6 have been taken in all the Related Cases; and

7 • Witnesses should be deposed only once, wherever possible.

8 The parties will endeavor to coordinate discovery and eliminate duplicative  
9 discovery where possible. Judge Campbell in the Arizona Related Case denied plaintiffs'  
10 motion for a coordination order (Defendants opposed the motion), which would have  
11 designated a lead judge to oversee discovery disputes and provided for uniform discovery  
12 rules across the Related Cases. Therefore, beyond informal efforts to coordinate  
13 discovery, each of the Related Cases will be litigated on separate tracks.

14 **(b) Suggested Revisions to the Discovery Limitations Imposed by the**  
15 **Federal Rules of Civil Procedure and LR 26(1)(e):** The parties agree Plaintiff may  
16 serve up to 25 interrogatories, including subparts, and 40 requests for admission (other  
17 than document authentication, which will have no limit), including subparts, on each  
18 Defendant. The parties agree Defendants may jointly serve up to 25 interrogatories,  
19 including subparts, and 40 requests for admission (other than document authentication,  
20 which will have no limit), including subparts, on Plaintiff and any future named Plaintiff.

21 **(c) The Number of Hours Permitted for Each Deposition:** The parties  
22 agree to follow the time limits specified in the Federal Rules of Civil Procedure. Nothing  
23 herein prevents a party from seeking an order allowing additional time to complete a  
24 deposition.

25 **10. Issues Relating to Electronically Stored Information ("ESI"):** The  
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1 parties request the Court enter the electronically stored information (“ESI”) discovery  
2 protocol filed simultaneously with this Joint Case Management Report.

3 **11. Issues Relating to Claims of Privilege or Work Product:** The parties  
4 request the Court enter the protective order and an order regarding the disclosure of  
5 privileged information filed simultaneously with this Joint Case Management Report.

6 **12. Scheduling:** The parties request that the deadlines in this lawsuit track the  
7 deadlines set forth in the Related Cases. Specifically, the parties request that the  
8 deadlines in this case be staggered 60 days later than the deadlines set in the California  
9 Related Case (as set forth below).

10 **(a) A deadline for the completion of discovery:** The parties request the close  
11 of discovery deadline be set on **August 14, 2017**.

12 **(b) A deadline for amending the pleadings and adding parties:** The parties  
13 request that the deadline to amend pleadings and add parties without leave of Court be set  
14 on **August 1, 2016**.

15 **(c) Dates for complete disclosure of expert testimony:**

16 The parties request the Court set the following deadlines: (1) Plaintiffs’ deadline to  
17 provide expert disclosures under Rule 26(a)(2)(A)-(C) relating to class certification be set  
18 for **January 6, 2017**; (2) Defendants’ deadline to provide expert disclosures under Rule  
19 26(a)(2)(A)-(C) relating to class certification be set for **February 6, 2017**; (3) the  
20 deadline for rebuttal expert disclosures relating to class certification, if any, be set for  
21 **February 20, 2017**; and (4) expert depositions relating to class certification be completed  
22 by **March 6, 2017**.

23 The parties request the Court set the following deadlines: (1) Plaintiff’s deadline to  
24 provide expert disclosures under Rule 26(a)(2)(A)-(C) be set for **June 26, 2017**; (2)  
25 Defendants’ deadline to provide expert disclosures under Rule 26(a)(2)(A)-(C) be set for  
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1 **July 24, 2017;** (3) the deadline for rebuttal expert disclosures, if any, be set for **August 7,**  
2 **2017;** and (4) expert discovery be completed by **August 21, 2017.**

3 **(d) A deadline for the filing of dispositive motions:** The parties request the  
4 deadline for filing dispositive be set on **October 2, 2017.**

5 **(e) A date by which the parties will file the joint pretrial order:** The parties  
6 request the deadline for filing the joint pretrial order be set on **November 6, 2017.**

7 **13. N/A (Relating to Patent Cases).**

8 **14. Whether a Jury Trial has been Requested and Whether the Request**  
9 **for a Jury Trial is Contested:** A jury trial has been requested by Plaintiff and that  
10 request is not contested.

11 **15. The Estimated Length of Trial and Any Suggestions for Shortening the**  
12 **Length of Trial:** Although too early to predict given the complex nature of the issues,  
13 the parties presently anticipate the trial lasting 3 to 6 weeks. Pre-admitting undisputed  
14 exhibits could help shorten the length of trial.

15 **16. The Prospects for Settlement:** The parties have generally discussed use  
16 of alternative dispute resolution procedures. The parties prefer private mediation. The  
17 parties propose that the parties complete mediation no later than **October 17, 2016.**

18 **17. Any Other Matters:** The parties request the following deadlines: (1)  
19 Plaintiff's deadline to file a motion for class certification be set for **March 27, 2017;** (2)  
20 Defendants' deadline to file their responses to Plaintiff's motion for class certification be  
21 set for **May 14, 2017;** and (3) Plaintiff's deadline to file a single reply, addressing  
22 arguments made by both Defendants, be set for **June 19, 2017.**

1 Dated: April 13, 2016      Respectfully Submitted,

2  
3 /s/ Norman E. Siegel

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9 ***Additional Plaintiff's Counsel***

10 Dated: April 13, 2016

Respectfully submitted,

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25 *Attorneys for Defendant*  
26 *Union Pacific Railroad Company*

IT IS SO ORDERED

*Valerie P. Cooke*  
U.S. MAGISTRATE JUDGE

DATED: *April 20, 2016*

1 Dated: April 13, 2016

COOLEY LLP

2  
3 /s/ Summer J. Wynn

Summer J. Wynn (admitted *pro hac vice*)

4 Attorneys for Defendants  
5 SFPP, L.P., KINDER MORGAN  
6 OPERATING L.P. "D," and KINDER  
MORGAN G.P., INC.

7  
8 **CERTIFICATE OF SERVICE**

9 I hereby certify that, on April 13, 2016, I electronically filed the above and foregoing  
10 with the Clerk of Court using the CM/ECF system, which transmitted notice of the filing to all  
11 counsel of record.

12  
13 /s/ Norman E. Siegel

Norman E. Siegel